

HA6AAKENS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

16 CR 385 (DLC)

5 DAVID W. KENT,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 6, 2017
12:00 p.m.

10 Before:

11 HON. DENISE L. COTE,

12 District Judge

13
14 APPEARANCES

15 JOON H. KIM
16 Acting United States Attorney for the
17 Southern District of New York
ANDREW KEN-WEI CHAN
Assistant United States Attorney

18 DAN COGDELL
19 Attorney for Defendant Kent

20 DAVID SPEARS
21 Attorney for Defendant Kent

HA6AAKENS

Sentence

1 (Case called)

2 MR. CHAN: Good morning, your Honor.

3 Andrew Chan, here on behalf of the United States. I'm
4 joined at counsel table by Evelynina Aslanyan, who is special
5 agent with the FBI.

6 MR. SPEARS: Good afternoon, your Honor.

7 Dan Cogdell and David Spears, present with Mr. Kent
8 and ready to proceed.

9 THE COURT: Welcome, everyone.

10 Mr. Cogdell, have you and your client both read the
11 presentence report?

12 MR. COGDELL: Yes, your Honor.

13 THE COURT: Have you discussed it with each other?

14 MR. COGDELL: Yes, your Honor.

15 THE COURT: Do you have any objections to it other
16 than what might be contained in the written sentencing
17 submissions?

18 MR. COGDELL: We do not.

19 THE COURT: Thank you.

20 The presentence report will be made part of the record
21 in this case and placed under seal. If an appeal is taken,
22 counsel on appeal may have access to the sealed report without
23 further application to this Court.

24 I have two letters from the government of September 22
25 and October 5 yesterday in light of the defendant's sentencing

HA6AAKENS

Sentence

1 submissions which could be read as challenging the loss
2 calculation here among other things. My chambers placed a
3 joint call to the government and defense counsel indicating
4 that I wished them to be prepared to address today the
5 forfeiture amount, the restitution amount and the loss amount
6 and as a result I got a letter of October 5 from the
7 government. I have a sentencing memorandum from the defendant
8 filed in redacted form on September 22.

9 Mr. Cogdell, would you make sure that Ms. Rojas has
10 full versions of the pages that have redactions so that the
11 un-redacted pages can be filed under seal.

12 MR. COGDELL: Yes, of course. I thought she had those
13 but I will certainly give them to her.

14 THE COURT: OK. And then I have exhibits to the
15 defendant's sentencing memorandum as well and I have an
16 October 4 letter from defense counsel. I have two submissions
17 from the victim here of September 28 and October 5.

18 Excuse me. One second.

19 (Pause)

20 THE COURT: We have in connection with this
21 sentencing, an order for restitution in the amount of
22 \$3,292,800.

23 Has that restitution amount been paid, Mr. Cogdell?

24 MR. COGDELL: It has not, your Honor.

25 THE COURT: What is the defendant's plan with respect

HA6AAKENS

Sentence

1 to that?

2 MR. COGDELL: We will pay as ordered, your Honor.

3 THE COURT: What does that mean?

4 MR. COGDELL: We're prepared to pay.

5 THE COURT: When?

6 MR. COGDELL: We have 2.9 in Mr. Spears' trust account
7 and we can wire the remainder or the balance whenever. He has
8 the ability to pay.

9 THE COURT: OK. So the 2.9 will be wired today?

10 MR. COGDELL: It can be, yes, ma'am.

11 THE COURT: And the remainder will be wired when?

12 MR. COGDELL: We can effectuate that Monday.

13 THE COURT: Monday is a holiday. I'll say Tuesday.

14 MR. COGDELL: Yes, your Honor.

15 THE COURT: OK. Any objection to signing the order of
16 restitution in the amount of \$3,292,800?

17 MR. COGDELL: No, your Honor.

18 THE COURT: Any objection to having full amount paid
19 by Tuesday?

20 MR. COGDELL: No, your Honor.

21 THE COURT: I'm signing the order of restitution and
22 making it part of this sentence.

23 (Pause)

24 THE COURT: There was an order of forfeiture. I've
25 signed a consent preliminary order of forfeiture on

HA6AAKENS

Sentence

1 December 19, 2016, and that is also part of this sentence. The
2 submissions raised in my mind, even though the defendant stated
3 that it was not challenging the loss calculation, it seemed
4 that the submissions made were in fact intended to challenge
5 the guidelines calculation, in particular, the loss amount. I
6 want to understand from the government, do they consider that
7 there was a breach here of the plea agreement?

8 MR. CHAN: Your Honor, based on the text of the
9 submissions themselves, it appears that they do adhere to the
10 loss amount of 1.5 million to 3.5 million. Of course, that
11 could also be a question that we can direct to the defendants
12 and ask them if they actually do in fact seek to challenge the
13 guidelines range that was stipulated between the plea agreement
14 during the sentencing.

15 THE COURT: Mr. Cogdell.

16 MR. COGDELL: We do not, your Honor.

17 THE COURT: OK. Thank you.

18 I was prepared, given the defense submissions, to
19 review in some detail the legal standards that apply to both a
20 calculation of a loss amount, calculation of restitution,
21 calculation of a forfeiture amount and if necessary, to
22 distinguish how each of those are calculated. They each have
23 their own separate standards and requirements of course from
24 what might be pursued as damages in a civil case which has its
25 own separate standards. None of them are equivalent. Each

HA6AAKENS

Sentence

1 stands on its own two feet and is subject to its own analysis.
2 But it doesn't appear any longer based on the oral
3 representations here that I need perform that legal analysis.

4 Counsel, when you address me if you find, if you
5 change your mind and find it is important for me to walk
6 through all those calculations and inquire further to support
7 each of them, I'd be happy to include that as part of this
8 sentencing proceeding.

9 There is an additional condition of supervised release
10 that I want to discuss with counsel and it's based on the
11 defendant's representations in his sentencing submissions. And
12 that would be an additional condition that he must not invest
13 in, work for or organize any social media business. If anyone
14 objects to that being a condition of supervised release,
15 please, let me know when you speak with me.

16 The defendant also raises as an issue in connection
17 with this sentence the way that the government chose to arrest
18 him. I believe the defendant indicates that the government
19 acted on a no-knock warrant and stormed into his home.

20 Mr. Chan, do you want to address that?

21 MR. CHAN: Your Honor, based on my conversations with
22 the special agent who is responsible for the execution of the
23 search warrant, she informs me that in fact FBI followed
24 standard procedure, knocked and announced their presence and
25 followed standard protocols in executing the search warrant.

HA6AAKENS

Sentence

1 THE COURT: Thank you.

2 Mr. Cogdell.

3 MR. COGDELL: We do not challenge the legality of the
4 execution of the warrant, your Honor. I didn't mean the
5 pleadings to reflect that. It was simply the way that the
6 arrest was effectuated, it was traumatic on not only Mr. Kent
7 but of course, his family and his children, his wife and his
8 children.

9 THE COURT: So were you intending to indicate to me
10 that the agents did not knock? Did they force their entry into
11 the home?

12 MR. COGDELL: Judge, it is my understanding that the
13 warrant was executed at six a.m. in the morning and they
14 obtained entry. Again, we're not challenging the legality of
15 it. We're just simply raising the issue or whatever it's worth
16 and it may not be the impact it had on his family.

17 THE COURT: OK. I'm just trying to understand why you
18 said it was pursuant to a no-knock warrant.

19 MR. COGDELL: That was my understanding.

20 THE COURT: OK. Yes. But was that to indicate to me
21 that they did not knock and instead forced their way into the
22 home and that traumatized the family?

23 MR. COGDELL: I do not believe there was a knock that
24 my client heard, your Honor.

25 THE COURT: So the defendant contends that they forced

HA6AAKENS

Sentence

1 their way into the home by a battering ram battering down the
2 door?

3 MR. COGDELL: May I have a moment, your Honor?

4 THE COURT: Certainly.

5 (Pause)

6 MR. COGDELL: I'm informed by Mr. Kent, your Honor,
7 that he did not hear a knock. He was informed -- he was yelled
8 at while he was on the inside there were a number of agents
9 outside with, I think, 10 to 12 agents outside with the number
10 of vehicles with the intendant necessary weapons.

11 THE COURT: I know, but how did the door get open?
12 Did the agents batter it down --

13 MR. COGDELL: No, ma'am.

14 THE COURT: -- or did the defendant open the door?

15 MR. COGDELL: I believe at this point my understanding
16 is he opened the door pursuant to being instructed, kind of, to
17 come out.

18 THE COURT: OK. Good. Thank you very much.

19 MR. COGDELL: Yes, your Honor.

20 THE COURT: So let me raise some additional
21 observations here. The defendant's sentencing memorandum
22 concentrates on whether people seeking jobs and posting their
23 information through Rig Zone were harmed but doesn't really
24 focus on the harm to the victim here including its employees
25 and and I think it's missing the major thrust of what happened

HA6AAKENS

Sentence

1 here as I understand it. And I'm going to lay this out in a
2 little bit of detail to make sure that if I have a
3 misunderstanding of what happened here, you can correct me so
4 that I wouldn't want to impose sentence based on the
5 misunderstanding.

6 The victim paid \$51 million to buy Rig Zone in 2010
7 and I believe the defendant was given a salary of \$250,000 for
8 a year after that while he remained as president and there was
9 a non compete agreement. When that non compete agreement
10 ended, the defendant opened Oil Pro and that was in 2013 and he
11 was certainly entitled under the law and under his non compete
12 agreement to build a competing business. But what he then did
13 almost immediately was hack into the computer system of Rig
14 Zone to steal information that would be valuable to his new
15 business and to his old business. He targeted the newest
16 members, participants in the Rig Zone venture and then almost
17 immediately reached out to the victim seeking to get it to buy
18 a second company from him, Auto Pro. And he participated or
19 engaged in a second hacking of Rig Zone in 2015 and attempted
20 that third one in December of 2015.

21 In his negotiations with the victim he sought more
22 than \$20 million as a purchase price for Oil Pro. So there's
23 fundamentally a fraud here besides the computer crime to which
24 he's pled guilty. There was certainly a breach of loyalty to
25 his former associates and employees at Rig Zone. It was

HA6AAKENS

Sentence

1 dishonest and cynical. His activities by setting up his
2 competing business built on a theft of information from Rig
3 Zone is a little startling to understand. And he was
4 undermining the integrity of the business he had built and then
5 sought to profit by selling a company for a second time, a
6 competitor he created or built upon stolen information.

7 The defense submissions I think are trying to create a
8 false equivalence with respect to the activity of the victim.
9 They assert that the victim invaded Oil Pro's computer system
10 engaging by implication in the same activity that the defendant
11 engaged in when he hacked Rig Zone's computer system. I don't
12 think they are equivalent or the same. And indeed, I don't
13 know that anything that Rig Zone did here or the victim did
14 here was a violation of law but as I understand it, what
15 happened was that public information on Oil Pro's website was
16 scraped. And it may have been a violation of the terms of use
17 but as sadly, we know in this computerized age there are all
18 kinds of scraping technologies out there that are used everyday
19 of the week by a variety of ventures and there are various ways
20 that one tries to prevent your information being scraping. But
21 it is of an all together different kind of activity than the
22 kind of hacking in which the defendant engaged.

23 I'm laying that out so if I've misunderstood something
24 you can correct my impression. Good. Let's talk about the
25 guidelines here.

HA6AAKENS

Sentence

1 There is a guidelines stipulation of an offense level
2 23, a criminal history category of one, with a guideline range
3 you 46 to 57 months. The probation department recommends a
4 sentence of 36 months which is a variance.

5 The defendant has argued for a variance below that 36
6 months by emphasizing the fact that the defendant's cooperation
7 with the law enforcement investigation was not considered by
8 the probation department when it made its recommendation. It's
9 emphasized the defendant's charitable work from as far back as
10 his college days. It's referred to other sentences and argued
11 that it would result in disparate treatment of the defendant to
12 sentence him to a longer period of incarceration than some of
13 those comparators. And of course it's emphasized that this is
14 his first criminal conviction.

15 I'll hear from the government.

16 MR. CHAN: Your Honor, as the Court is aware, the
17 government is recommending a substantial term of incarceration
18 in this case but one that ultimately is less than the
19 guidelines range that's suggested in the presentence report.
20 And I think we have to start with the proposition that what the
21 defendant did and as the Court has observed, was an incredibly
22 serious offense.

23 And, your Honor, we do in large part agree with the
24 defendant, the Court's characterization of the conduct in its
25 statement. And we wanted to just highlight a couple of aspects

HA6AAKENS

Sentence

1 of the defendant's conduct.

2 I think the first is that this story begins, as the
3 Court observed, with what appeared to be a success story. An
4 individual with an entrepreneurial spirit, founding a company
5 and selling it for a huge sum of money, \$50 million in --

6 THE COURT: Or 51.

7 MR. CHAN: \$51 million in 2010. That's a success
8 story. That's coming up with a business idea and coming up
9 with a business plan that made a lot of money and had over
10 \$900,000 active users on its website using that program to
11 final jobs in the oil and gas industry.

12 But unfortunately, this case ultimately is a story
13 about greed. It's a story about how this defendant was not
14 satisfied with that sale and set out to start a new venture.
15 And instead of going into that venture lawfully, he chose to
16 violate the law. And we laid out in our sentencing submission
17 the numerous ways in which this crime was an incredibly
18 sophisticated one. The use of a virtual private network and
19 the name of the private network was Hidemyass.com, the use of a
20 virtual private network to mask his internet protocol address
21 so that the victims wouldn't be able to identify who was the
22 user hiding behind that computer screen downloading hundreds of
23 thousands of resumes from their data business, the use of
24 intimate knowledge of the Rig Zone system, intimate knowledge
25 that even many members of the Rig Zone company weren't aware of

HA6AAKENS

Sentence

1 and had to hire outside contractors to discover, and all the
2 while still engaging in these conversations with the victim
3 encouraging them to move forward in making him an offer to
4 purchase this additional company and suggesting that \$20
5 million at a minimum would be a reasonable price to purchase
6 this new company.

7 Your Honor, the defendant has been charged with one
8 count of intentionally accessing a protected computer without
9 authorization. In many ways this could have been charged as
10 800,000 separate counts because over the course of three years
11 from October of 2013 through December of 2015, that's what he
12 did. He designed an automated system that allowed him to
13 access 796,000 times this protected computer without
14 authorization taking their valuable data.

15 Your Honor, the other thing that we wanted to
16 highlight is that one of the things that's perhaps sometime
17 lost in an individual case like this is that we live in an age
18 now where our computer infrastructures are frequently under
19 attack. We see news articles seemingly every single week, if
20 not every single day about important companies and important
21 government agencies and infrastructure that have their
22 databases breached and hacked. And it's only in a very small
23 subset of these cases where we're successfully able to identify
24 the wrong doer.

25 This is an extremely unique case. We are very

HA6AAKENS

Sentence

1 fortunate in a lot of ways in this investigation because the
2 FBI was able to get involved at an really stage and was able to
3 track the defendant's activities in December of 2015 when he
4 attempted to hack that third time. We were very fortunate to
5 have the cooperation of law enforcement in the United Kingdom
6 who were able to get us the records from this Hidemyass BPN
7 which showed that the Internet protocol address being used by
8 the defendant was one who was committing these hacks.

9 But there are so many cases that the government
10 investigates where there's been similar network intrusions
11 where we're ultimately not able to find out who the wrong doer
12 is. And so we do believe, your Honor, that both specific
13 deterrence and general deterrence are significant grounds for
14 the Court to impose a significant term of incarceration here.

15 That being said, your Honor, the Court also has to
16 consider the personal characteristics of this defendant. And
17 the government has no dispute from this side of the table that
18 the defendant is not solely defined by his crime that he's
19 committed. I think that his sentencing submission and the
20 presence of his family members here today in court are all
21 indicative that the defendant is a good father, a loving
22 husband, a very good friend and generous to those who are close
23 to him and he obviously has a lot to contribute to this country
24 and to this society seeing as he created this company from the
25 ground up that's worth tens of millions of dollars.

HA6AAKENS

Sentence

1 We also don't dispute the representations in the
2 defendant's submissions about his attempts to provide
3 cooperation to the government. His statements about how he was
4 able to assist law enforcement in apprehending another computer
5 hacker in the oil and gas space is absolutely correct. And
6 Judge Castel sentence that defendant to I believe 18 months of
7 imprisonment last month.

8 For those reasons, your Honor, because the defendant
9 does seem to have a low likelihood of re-offending, because his
10 cooperation with the government and his agreement to plead
11 guilty in this case do appear to show that he has legitimately
12 become remorseful of his previous crimes and because we do
13 believe that there will be significant financial penalties in
14 this case including the forfeiture, including the full
15 restitution that will be paid to the victims, the government
16 does believe that under the Section 3553(a) factors that a
17 sentence that is incarceratory and that's significant but that
18 is less than the guidelines range recommended that's laid out
19 in the presentence report, we do believe that such a downward
20 variance would be warranted in this case.

21 THE COURT: Mr. Cogdell.

22 MR. COGDELL: Thank you, your Honor.

23 I don't know where to start so I'll do the best I can
24 because it appears to me that my pleadings, our pleadings have
25 done more harm to my client than good which disappoints me

HA6AAKENS

Sentence

1 greatly. I feel it only fair to point out from a 30,000 foot
2 level that the intention of talking about the loss calculations
3 was not meant to attack or undermine our plea agreement. In
4 fact, as Mr. Chan alluded to in one of the sentencing
5 memorandums, the government and the defense had numerous
6 meetings about the loss calculations before the plea agreement.
7 They were professional. They were accessible. They were
8 appropriate but we were wide apart on what the numbers were.
9 At the end of the day we did not have the benefit of
10 depositions. We had our expert, Neal Beaton, who had done a
11 tremendous amount of work parenthetically and is probably no
12 longer now, but when the Court notified Mr. Spears yesterday
13 when we flew in Mr. Beaton to talk about the loss calculations
14 but given the Court's opinion, I don't think I want to go
15 there.

16 THE COURT: Well, what do you mean, my opinion? If
17 there is a dispute I am absolutely anxious to hear everyone and
18 I am absolutely prepared to hear argument about the loss
19 calculation.

20 MR. COGDELL: Well, the reason to be clear that we are
21 raising or raised the issue of lost calculation was because we
22 thought the actual loss to Rig Zone was much less than we had
23 previously agreed to. And when the depositions occurred,
24 judge, we're in a Hobson's choice and the depositions to me --
25 and again, I may view it with different eyes than the Court,

HA6AAKENS

Sentence

1 but the depositions to me clearly demonstrated the loss
2 calculations were different than we agreed to. So I have, we
3 have the Hobson's choice of not doing anything and not raising
4 those issues with the Court and being chided as ineffective
5 later on or submitting them and arguing them and potentially
6 running into the Court's perception that we're trying to breach
7 the plea agreement or considering close to that line. Nothing
8 was intended to possibly constitute a breach of the plea
9 agreement.

10 THE COURT: So Mr. Cogdell, I feel like you're digging
11 a bigger hole here. So, let's just step back a moment.

12 MR. COGDELL: Yes.

13 THE COURT: OK. The government will or won't take the
14 position that you've breached the plea agreement. If they are
15 not raising the issue -- and I always raise this. Usually,
16 well, I raise it with the government or the defendant at every
17 sentence when the issue might be appropriate to be raised
18 because I need to know whether or not somebody is going to take
19 the position that there's been a breach of the plea agreement.
20 That has ramifications.

21 MR. COGDELL: Of course.

22 THE COURT: I've raised it here. The government is
23 not taking the position as of this moment that there's a
24 breach. I have no idea if it will before I impose sentence.

25 Two, you have a letter from the government of

HA6AAKENS

Sentence

1 October 5 laying out in exquisite detail how it arrived at a
2 loss calculation here.

3 Now, you agreed in a plea agreement to a loss
4 calculation that was a premise for a guidelines range. You can
5 dispute that if you want even though you have a plea agreement.
6 That's just fine, and that's appropriate to do here if you
7 want. But you have the government's letter of October 5. I
8 expect you had its oral presentation earlier, but at least as
9 of October 5 you have its statement explaining its basis for a
10 calculation. I don't understand anything you have said in your
11 papers or are saying to me orally now that disputes either the
12 methodology or the figures in the October 5 letter.

13 The issue of how much a party spent on an internal
14 investigation of a breach of its computer system and to remedy
15 that problem is an interesting component but it is only a
16 component of a loss calculation. So, if you want to contest
17 the loss calculation as laid out in the October 5 letter from
18 the government, I'm happy to give you that opportunity.

19 MR. COGDELL: May I have a moment to confer with
20 Mr. Spears and my client, your Honor?

21 THE COURT: Sure.

22 (Pause)

23 MR. COGDELL: Your Honor, if I could have Mr. Spears
24 address the Court?

25 THE COURT: Sure.

HA6AAKENS

Sentence

1 MR. SPEARS: May I, your Honor?

2 THE COURT: Sure.

3 MR. SPEARS: So it should be clear we are not
4 disputing the loss calculation in the plea agreement. We do
5 not intend to take any action that would lead anyone to
6 conclude that we have disputed the loss calculation. It is our
7 understanding of the law in this circuit and else where that
8 under 3553 the Court may consider whether the particular loss
9 calculation agreed to overstates the seriousness of the offense
10 as a variance factor. That is the context in which we raised
11 it. We have never -- we've done our best with the government.
12 They've stuck with this number. We understand that. We
13 respect that and we stuck with the number too. But we did
14 raise it with the Court in the context of a possible variance
15 under 3553.

16 THE COURT: Well, I don't know what number you're
17 sticking with. It seems to me there's no dispute about the
18 numbers. There could be a dispute about the methodology that
19 arrives at a set of numbers. The government -- your, as I
20 understand from the papers, want the Court to focus on only one
21 component of the government's loss calculation. It has
22 taken -- and I think this is a conservative number -- 360,000
23 as mediation and investigation costs. I think there is some
24 support for a far larger number in the papers. I have
25 something over 400,000 as a number. And of course this doesn't

HA6AAKENS

Sentence

1 count at all, the amount of time and energy cooperating with
2 the government investigation which theoretically could be also
3 included.

4 So to me your dispute is, if I understand it and it's
5 not clearly state today me what the argument is, is that you
6 would like me to just focus on let's say the 360,000 dollar
7 figure and not think about the rest of the calculation as is
8 described in the government's letter which has to do with the
9 valuation of the significance of the theft.

10 MR. SPEARS: If I may differ with the Court, our
11 argument is that in the discovery that took place in the civil
12 proceeding the plaintiff in that case, the victim admitted
13 through a variety of mouths that they have had no cognizable
14 loss and we learned that for the first time when the discovery
15 occurred. We learned about Mr. Chan's approach to valuation at
16 the time when we got his letter yesterday. And our argument is
17 that notwithstanding the methodology employed by Mr. Chan which
18 we have agreed, we've agreed to the result, we believe that in
19 terms of considering our argument for a variance, the Court can
20 consider whether the loss amount agreed to overstates the
21 seriousness of the offense.

22 We have a variety of factors that we would rely on to
23 make that argument to the Court. We brought an expert today
24 after we heard from the Court's deputy clerk yesterday. We are
25 not disputing the terms of the plea agreement. We're not

HA6AAKENS

Sentence

1 trying to get away from the number we agreed to there. We're
2 invoking those cases that say defendant can, nonetheless, argue
3 to the Court that a further examination of the loss amount
4 supports a variance.

5 THE COURT: Mr. Spears, are you disagreeing at all
6 with the methodology described in the government's October 5
7 letter which tries to create a valuation of the stolen
8 information?

9 MR. SPEARS: We do not dispute it for purposes of our
10 agreement with the stated loss amount, the stipulated loss
11 amount.

12 THE COURT: Do you dispute it as a proper methodology
13 to employ under the law with respect to arriving at a loss
14 calculation?

15 MR. SPEARS: No. We have an alternative method of
16 valuation that we were prepared to present to the Court that we
17 are prepared to present to the Court that results in a much
18 lower number. And we have argued that in lawyer lay terms in
19 our sentencing memorandum that it supports our argument for a
20 variance. It's a very different methodology, a very different
21 number. We ask the Court to consider that in connection with
22 our requests for a variance under 3553.

23 THE COURT: Well, if you would like to present
24 evidence or argument in connection with the sentence, of
25 course, this is the time to do it. If that's the way you wish

HA6AAKENS

Sentence

1 to proceed, I'm absolutely happy to hear you.

2 MR. SPEARS: Well, we are content to rest on the
3 arguments we made in our papers to that effect. We have an
4 expert here who we're prepared to call. Just want to say again
5 that we are not going back on our commitment in the plea
6 agreement and we believe that it is open to the Court to
7 consider the variance argument we're making but we do not
8 intend to take any steps or step that could be interpreted as a
9 repudiation plea agreement. I just want to be perfectly clear
10 about that.

11 THE COURT: Well, it's your decision whether or not
12 you wish to call an expert. I am not going to make that
13 decision for you. That would be inappropriate. So you have to
14 decide whether you want to call an expert or not.

15 MR. SPEARS: May I confer with counsel and my client
16 momentarily, your Honor?

17 THE COURT: Yes, ma'am.

18 (Pause)

19 MR. SPEARS: May I, your Honor?

20 THE COURT: Yes.

21 MR. SPEARS: We are not going to call the expert. We
22 are going to present nothing further on this subject. We hear
23 the Court and we're ready to proceed.

24 THE COURT: OK. Mr. Cogdell, I don't believe you
25 you've completed your statement to me.

HA6AAKENS

Sentence

1 MR. COGDELL: I did not. I just wanted to point out,
2 you asked me to suggest to you if I took issue with any of your
3 observations.

4 THE COURT: Please.

5 MR. COGDELL: And a couple.

6 First, I respectfully disagree that Mr. Kent was
7 trying to sell Oil Pro to Rig Zone in January of 2014.

8 THE COURT: Well, to the victim.

9 MR. COGDELL: To the victim, yes.

10 At that point, of course, in the chronology of things,
11 the victim was aware of hacks and Mr. Kent was not aware that
12 the victim was aware of the hacks. So from that standpoint
13 Mr. Kent came to New York at the request of the victim and what
14 he was looking for was not a purchaser but a valuation, a
15 metric, a number, if you will. The 20 million dollar number
16 that keeps being tossed around or quoted comes from Mr. Kent
17 was discussing the value of the software of Oil Pro. It was
18 different in kind from the value or from the format and the
19 assets of the software of the victim. He was extolling the
20 virtues of the software of Oil Pro.

21 They ask him if he had investors. And he said I have
22 another investor who invested three million dollars and he has
23 15 percent of the company. Well, if you do the math on that
24 that translates into a 20 million dollar valuation. But it is
25 my understanding that at no time did Mr. Kent say if you give

HA6AAKENS

Sentence

1 me \$20 million, I will sell you the company.

2 As the Court is probably aware more keenly than I,
3 start-up companies like this, one of the hardest things to do
4 is to establish the valuation. And that was the purpose of
5 Mr. Kent's trip to New York, not to sell the company but to get
6 a number and proceed from there. He had no intention of
7 selling Rig Zone to the victim but he was looking for investors
8 in many places and wanted to see if there was an interest
9 there.

10 So I do not believe there was a fraud, respectfully.
11 I believe that what Mr. Kent was doing was different than what
12 the victims were doing because they were aware that he had
13 hacked and they were, they, the victims were understandably
14 asking him questions about how many members, how did you get
15 them, why they were there? Certainly, we concede the fact that
16 Mr. Kent wasn't completely fulsome about that but we do not
17 believe there was a fraud and that's why we didn't -- just
18 jumping way sideways for a minute if you could follow my
19 colloquy -- at the time when Mr. Kent was cooperating he did
20 not receive a plea agreement or a cooperation agreement. He
21 did not receive a cooperation agreement here in New York
22 because he would not agree to replead and include the fraud
23 case. As his counsel we did not believe that Mr. Kent was
24 guilty of the fraud case. Certainly, he was guilty of the
25 hacking case but we did not believe he had the intention to

HA6AAKENS

Sentence

1 defraud. We did not believe that Mr. Kent's failure to be a
2 hundred percent fulsome about the source of all his data
3 constituted a fraud. That is the primary disagreement I have
4 with the Court's observations.

5 The other in terms of the false equivalency, just
6 highlighting that for a minute, your Honor, I don't think we
7 were suggesting for a minute or weren't trying to suggest that
8 Rig Zone was just as guilty as Kent. Rather, we were pointing
9 out to the Court that the scraping that was engaged in by the
10 victim was done with many of the same character traits, if you
11 will, of the hack of Mr. Kent. The primary similar aspect of
12 it was using a computer program using a -- and using non --
13 Whether the Court feels like the victim's failure to disclose
14 to the FBI and law enforcement and the government that it was
15 scraping which was certainly we believed to be a violation of
16 the terms and conditions of the user agreement is up to the
17 Court.

18 But if I could, those observations having been said,
19 I'd like the opportunity at some point to address why we feel
20 like Mr. Kent should get a non guidelines sentence.

21 THE COURT: Sure. Absolutely.

22 MR. COGDELL: There are really three issues on the
23 table at present, your Honor, why I think that a non guidelines
24 sentence is appropriate. And perhaps educating the Court more
25 than I should, I have spent a tremendous amount of time with

HA6AAKENS

Sentence

1 Mr. Kent over the last year and a half and I have gotten to
2 know him not only as a client but as an individual. And I
3 realized and recognize it's a dangerous thing to do to vouch
4 for your client but I've seen what he has gone through. I have
5 seen how he has been eviscerated. I have each seen how it has
6 changed his life in some horrible ways and a couple of good
7 ways.

8 But focusing on the positive for a moment, after
9 Mr. Kent made the decision to plead guilty, in the valuation
10 quest where we were trying to convince the government that
11 their loss calculations were high and ours were appropriate,
12 one of the things that Mr. Kent did was buy resumes from this
13 fellow named Kevin Forbes. It was above the table. It was
14 nothing anything but appropriate about that and we used the
15 purchase of those resumes to try to encourage the government to
16 see a lower loss calculation from our side. He purchased them
17 from a number of different people but in sort of an effort to
18 set the market or establish a price. That's how he came in
19 contact with Mr. Forbes. Later on Mr. Forbes approached
20 Mr. Kent as detailed in the papers and suggested to him that he
21 had some resumes that were obtained improperly and asked
22 Mr. Kent if he wanted to buy them.

23 Being completely candid with the Court, this was in
24 the September timeframe of last year. We didn't know if
25 Mr. Forbes might have been some sort of agent for the

HA6AAKENS

Sentence

1 government or Mr. Forbes was acting on his own. We didn't
2 report that to the government because we didn't know what his
3 true purpose was, that is, if he was really an agent of the
4 government or he was simply an individual looking to advantage
5 himself improperly.

6 After Mr. Kent's plea we met with the government. We
7 came up here on numerous occasions, met with the FBI agent
8 that's present in the courtroom. There's another FBI agent,
9 Mr. Merriman, who is in the back. I made, Mr. Spears and I
10 made the unusual step of turning our client over to the
11 government. We didn't need to be in the phone conferences. We
12 didn't need to be in the e-mail exchanges. We let the
13 government have complete and full access to our client. And
14 frankly, the reason that we did that was we trusted our client
15 and that trust paid off. But there was a series of
16 communications arranged effectively by the government with
17 Mr. Kent's participation and assistance which ultimately
18 arranged for Mr. Forbes to come over here from overseas, met
19 here in New York. There were dinners involved, lunches
20 involved, downloads involved and pleading to point out. The
21 agents were in the next room and ultimately Mr. Forbes was
22 arrested and pled guilty.

23 All of that solely because Mr. Kent made the decision
24 to cooperate. All of that solely because or in spite of the
25 fact that he didn't have any cooperation agreement which in my

HA6AAKENS

Sentence

1 view makes his cooperation more commendable than not. The
2 government was not obliged. We had no guaranteed
3 recommendation, nudge, nudge, five case coming, don't worry
4 about it. He did it on blind faith and he did it for the right
5 reasons.

6 I've never had a client do that. Maybe it's done
7 here. You do things differently in the great state of New York
8 than we do in Texas. That's of no moment but that's a first
9 for me, truly.

10 The other thing that is hard for me and these
11 circumstances -- not to get emotional about it because I'm
12 moved by it -- but his charitable work and his character is
13 amazing. I mean, as pointed out in the papers, when most of us
14 in college were doing something else on Saturday mornings not
15 near as noble as what Mr. Kent was doing, he was working for
16 Big Brothers/Big Sisters. He and his lovely wife, Casey, got
17 married. They donated a house through Habitat for Humanity out
18 of the goodness of their wallet.

19 I've never seen a situation where an individual like
20 Mr. Kent who is going through problems with alcohol, met
21 another man, as detailed in the pleadings, in Alcoholics
22 Anonymous and that fellow was homeless at the time and he
23 bought him a house. That's not only impressive to me. That's
24 amazing to me. This was never thought he would be arguing that
25 asset, if you will, in the district court 15 years later but it

HA6AAKENS

Sentence

1 speaks to his character then and it speaks to his character
2 now.

3 After that same individual lost his job Mr. Kent lent
4 him money to start a business. His assistance to others is
5 simply outstanding. The fellow I am speaking about is Troy
6 Carewell. Mr. Kent has remained, even though he made a
7 substantial amount of money, he's remained extremely charitable
8 post the sale of Rig Zone. He is active in his church. He has
9 shut down Rig Zone.

10 THE COURT: "Oil Pro".

11 MR. COGDELL: I'm sorry. Yes. "Oil Pro". Thank you.

12 He has shut his company down. He cannot and will not
13 reoffend.

14 His relationship with his wife and his three children
15 is detailed in the pleadings and it's extraordinary.

16 I understand the Court's angst with our raising the
17 issue concerning the loss calculations from a 3553 standpoint,
18 but if there was a fault there, that fault is with me.

19 THE COURT: Well, I am not disputing the relevance of
20 the issue. I'm disputing the tone and tenor of the argument --

21 MR. COGDELL: Yes.

22 THE COURT: -- and the lack of recognition of the
23 extent of the fraud here, the willingness to blame the victim
24 as opposed to taking full acceptance and responsibility for
25 one's own misconduct, the efforts to minimize, I think it was

HA6AAKENS

Sentence

1 an unusual approach in my mind because the bottom line facts
2 are not in dispute. I mean, the theft of data, the effort to
3 get more money out of the victim having already gotten 51
4 million and to get that more money out of the victim based on
5 stolen information from the business you built, I mean, there
6 is just a sadness about this case that is deeply compelling.

7 MR. COGDELL: Again, your Honor, Mr. Kent did not
8 draft the sentencing memorandum. I did and Mr. Spears did.
9 And if there's fault, it should be laid and it's certainly
10 accepted here. But regardless of those mistakes on my part, I
11 don't think that it's anything but correct to look at the other
12 positive things that we've seen in this case which is his
13 cooperation, which is his charitable work, which is his
14 relationship with wife, which is his relationship to the
15 community, which is his relationship to his church. Any and
16 all of those things, particularly bundled together, are a
17 significant driver in my respectful opinion for a significant
18 departure downward variance from the guidelines. And I don't
19 want to beat this horse any more but I can't apologize enough
20 if my pleadings, these pleadings have -- to the negative of my
21 client.

22 THE COURT: Thank you, Mr. Cogdell.

23 Mr. Kent, is there anything that you wish to say on
24 your behalf in connection with this sentence?

25 THE DEFENDANT: Yes, your Honor.

HA6AAKENS

Sentence

1 First, I'd like to say that I'm deeply remorseful for
2 my actions. With every fiber in my body I wish I could go back
3 and change the actions that I took and the harm and pain that
4 it's caused to other people. I ask for their forgiveness.

5 Back in December of 2016 I had the opportunity to meet
6 with the officers of Dice Holdings, the victim, and at that
7 time I apologized to them, and I wonder if they will forgive
8 me.

9 The last 18 months have been obviously very difficult
10 for me and my family which they should be. There hasn't been a
11 day that's gone by that I haven't thought about this case and
12 thought about my wrongdoing. I take full responsibility for my
13 actions. No one made me do anything.

14 As I have reflected back on what happened and what led
15 me astray I come back to two events. The first was back when I
16 was employed by the victim and even prior to that there was a
17 web address that was accessible that where you could download
18 resumes and I went and I checked it and I copied resumes and
19 that was wrong and I knew it was wrong at the time. And I have
20 a spiritual adviser and I went to him and I said this is what I
21 did and I feel really bad about it. And he even gave me a
22 book. He said you need to read this book and it was called
23 'Cheaters Never Win'. I read that book and I said, I told
24 myself, I'm not ever going to do this again. And more than a
25 year and a half elapsed and I had not done anything.

HA6AAKENS

Sentence

1 And then I think at that point I made my gravest
2 mistake was after I learned about resumes being taken from my
3 own website, I got angry and I was upset and I retaliated which
4 was absolutely wrong. It was the wrong response and I wish I
5 could go and un-push those buttons so badly. I never thought
6 that those actions would bring me here in front of you. I
7 didn't at that time understand the gravity of copying the
8 resumes but I certainly do today. My actions have caused so
9 much pain and suffering, so much suffering.

10 My wife is diagnosed -- excuse me.

11 (Pause)

12 THE DEFENDANT: My wife is diagnosed with PTSD and she
13 is recovering and she knows I love her very much. My three
14 children are in therapy because they were a part of a lot of
15 this and they have had problems. But I pray that they'll be OK
16 in the end and they know that I love them and it was my actions
17 that caused that. I'm also deeply sorry to my parents for
18 having to endure this. They did not teach me to behave like
19 this and I've asked them for their forgiveness and I have
20 received that from them. But I think I'm certainly, I'm very
21 sorry for any harm that has come to Dice whatever that may be.
22 I honestly don't know the full extent of what the damages were
23 but I accept I'll pay, et cetera, whatever I need to do which
24 has been made clear.

25 But I think that the thing that bothers me the most

HA6AAKENS

Sentence

1 about my actions is that I dishonored my God because I've
2 always lived a christian life and I was taught to lead a life
3 of that Christ would and I fell so far short of that. I think
4 my sin was at first I thought it was agreed but I already had
5 plenty of money. Money wasn't driving me. People asked me, it
6 was like why would you do that? You already had enough money.
7 And I think after reflection and prayer, my true sin was pride,
8 trying to prove to myself that I could build another company
9 again and I took a shortcut and while only not to downplay what
10 I did, only four percent of my six hundred thousand numbers
11 came from these hacks. But that doesn't matter. I still did
12 wrong.

13 I'm a beaten man. I'm definitely a beaten man but I
14 have been humbled to a state that I never thought I could get
15 to and I believe that God is rebuilding me up to be the person
16 that he wants me to be and that is one of the reasons why I
17 shut down my company. My family and I lost \$6 million when I
18 shut down that company. I felt it was the right thing to do
19 and I feel called to lead a life of service for other people.

20 This whole experience has, "change" isn't even the
21 right word. I'm hurt from all of this but I'm also glad that I
22 was derailed because now I can have a more fruitful and better
23 life. And so I just ask your Honor, I ask for mercy and I can
24 promise you that no one will ever see my name as any part of
25 wrongdoing ever again.

HA6AAKENS

Sentence

1 Thank you for --

2 THE COURT: Thank you, Mr. Kent.

3 Please stand.

4 I don't know that I have much more to say, Mr. Kent,
5 than what I've already said. I think the fundamental thrust of
6 what you did here is not so much of economic crimes. It's
7 really a betrayal of trust and a breach of loyalty and a level
8 of deceit and dishonesty that was very, very sad and
9 disappointing.

10 That said, I certainly agree that the guidelines range
11 is not representative of what would be a reasonable sentence
12 here, and so the issue for me is how deep a variance to grant
13 from the guidelines range. Probation recommends a variance
14 that would result in a three year term of imprisonment. I
15 don't think that's necessary either.

16 I do think that because of the seriousness of the
17 crime, the complexity of the criminal activity, the ongoing
18 nature of it, the repeated nature of it and even the
19 negotiations with the victim afterwards, all suggest here that
20 very serious misconduct took place and it is deserving in terms
21 of punishment and is a matter of general deterrence, a period
22 of imprisonment.

23 In terms of individual deterrence I would like to
24 believe you when you make this commitment to me that you have
25 learned your lesson and will change the thrust of your life to

HA6AAKENS

Sentence

1 build upon the good that is within you and has always been
2 there and to make sure that you don't repeat the criminal
3 conduct in which you chose to engage over this several year
4 period of time as reflected in your plea of guilty.

5 So I'm going to impose a term of imprisonment of a
6 year and a day, to be followed by a term of supervised release
7 of three years with the following special conditions:

8 You must cooperate in the collection of DNA.

9 You must comply with the standard conditions of
10 supervised release.

11 You must participate in a program approved by the
12 probation department for alcohol abuse.

13 You must submit to a reasonable search by the
14 probation department.

15 You must seek and maintain full-time employment.

16 You are to provide the probation department access to
17 any and all requested financial information.

18 You must not incur any new credit card charge or open
19 any new credit line without approval of the probation
20 department.

21 You must comply with their probation department's
22 request for a reasonable search of your computer equipment as
23 reflected on page 36 of the presentence report?

24 You must not invest in, work for or organize any
25 social media business.

HA6AAKENS

Sentence

1 You must perform 200 hours of community service per
2 year for each year of supervised release in a program approved
3 by the probation department.

4 You shall notify the U.S. Attorney's office for this
5 district within 30 days of any change of mailing or residence
6 address that occurs while any portion of restitution or
7 forfeiture remains unpaid.

8 You're required to pay the full amount of restitution
9 by this coming Tuesday.

10 You shall be supervised in the district of your
11 residence.

12 You shall pay a special assessment of \$100.

13 I am imposing a fine of \$20,000.

14 I've already stated the restitution and the forfeiture
15 amounts.

16 You shall pay any remaining amounts due and owing with
17 respect to restitution or forfeiture while in prison or
18 following imprisonment at a rate of 20 percent of your gross
19 monthly income.

20 THE COURT: Counsel, is there any legal reason why I
21 cannot impose the sentence I've described as stated?

22 MR. COGDELL: There is not, your Honor.

23 MR. CHAN: No, your Honor.

24 THE COURT: I order the sentence I've describe on the
25 record to be imposed as stated.

HA6AAKENS

Sentence

1 You may be seated, Mr. Kent.

2 I believe there are open counts?

3 MR. CHAN: Yes, your Honor, and the government would
4 move to dismiss any open counts with respect to this defendant.

5 THE COURT: Your application is granted.

6 Mr. Kent, I need to advise you of your right to
7 appeal. You've largely given up your right to appeal because
8 of the plea agreement and because of your plea of guilty but,
9 nonetheless, I'm required by law to advise you of the
10 following:

11 If you are unable to pay the cost of an appeal, you
12 may apply for leave to appeal in forma pauperis. Any notice of
13 appeal must be filed within 14 days of the judgment of
14 conviction.

15 Counsel, is there anything else we need to do?

16 MR. CHAN: No, your Honor.

17 MR. COGDELL: No, your Honor.

18 THE COURT: I'll going to allow the defendant to
19 surrender.

20 You must surrender by November 27 at two p.m. at the
21 designated institution.

22 MR. COGDELL: One query, your Honor?

23 THE COURT: Yes.

24 MR. COGDELL: It is my understanding that the courts
25 in this jurisdiction do not make recommendations as to

HA6AAKENS

Sentence

1 placement.

2 THE COURT: I will not recommend a specific
3 institution. I'll recommend a location. For instance, do you
4 want a designation if possible to the state of Texas?

5 MR. COGDELL: Absolutely, yes.

6 THE COURT: I'll make that recommendation.

7 MR. COGDELL: Thank you.

8 (Adjourned)